IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

NO. 76-6829

TAYLOR HANCOCK, JR., Petitioner

v.

STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

JAMES KURA
Franklin County Public Defender
400 South Front Street
Columbus, Ohio 43215
Phone: (614) 224-8374

and

C. WILLIAM LUTZ
400 South Front Street
Columbus, Ohio 43215
Phone: (614) 224-8374

Counsel for Petitioner

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules

Miscellaneous

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. A-809

TAYLOR HANCOCK, JR., Petitioner

v.

STATE OF OHIO, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

The petitioner, Taylor Hancock, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ohio Supreme Court entered in this proceeding on December 8, 1976.

OPINION BELOW

The opinion rendered by the Ohio Supreme Court is officially reported at 48 Ohio St. 2d 147 (1976) and unofficially at 358 N.E. 2d 273 (1976). The opinion of the Tenth District Court of Appeals, Franklin County, was not officially reported, but does appear in the Court's publication of 1975 Decisions 2260. Copies of both opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Ohio Supreme Court was delivered and entered on December 8, 1976. A timely motion for rehearing was denied on January 18, 1977. On April 4, 1977, Mr. Justice Stewart entered an order extending the time to file the petition for writ of certiorari until and including May 31, 1977. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether a defendant in a criminal case can be sentenced to death for a murder while in the course of a robbery when the jury has found him not guilty of the specification of having committed the murder in the course of a robbery.

2. Whether a trial court can deny to a defendant in a capital case the right to voir dire the prospective jury members regarding their attitudes toward the death penalty and to inquire into the effect their attitudes will have on their ability to sit as fair and impartial jurors.

3. Whether, on the facts of this case, the photographic identifications made of petitioner were so impermissibly suggestive so as to create a substantial risk of irreparable misidentification, and hence violate petitioner's Fourteenth Amendment right to due process of law.

4. Whether Ohio's statutory scheme for imposition of the death penalty, as construed by the Ohio Supreme Court, renders capital sentences imposed under it cruel and unusual in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OF PROCEDURE INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio law; each of which is found in Amended Substitute House Bill 511, effective January 1, 1974.

Ohio Revised Code Section 2903.01.

> Aggravated murder.
> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punsihed as provided in section 2929.02 of the Revised Code. (Page's Ohio Revised Code, p. 15).

Ohio Revised Code Section 2929.02.

> Penalties for murder.
> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as de-

termined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death. (Page's Ohio Revised Code, p. 152).

Ohio Revised Code Section 2929.03.

Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and,if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the state, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender. (Page's Ohio Revised Code, p. 153).

Ohio Revised Code Section 2929.04.

Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941. 14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or the president-elect of vi[illegible]sident-elect of the United States, or of the [illegible]nor-elect or lieutenant governor-elect of [illegible] state, or of a candidate for any of the fo[illegible]ng of[illegible]es. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was commited for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravated circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderence (preponderance) of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity. (Page's Ohio Revised Code, p. 154).

Ohio Rules of Criminal Procedure, Rule 11.

Pleas, Rights Upon Plea

(A) Pleas. A defendant may plead not guilty, not guilty by reason of insanity, guilty or, with the consent of the court, no contest. A plea of not guilty by reason of insanity shall be made in writing by either the defendant or his attorney. All other pleas may be made orally. The pleas of not guilty and not guilty by reason of insanity may be joined. If a defendant refuses to plead, the court shall enter a plea of not guilty on behalf of the defendant.

(B) Effect of guilty or no contest pleas. With reference to the offense or offenses to which the plea is entered:

(1) The plea of guilty is a complete admission of the defendant's guilt.

(2) The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, or complaint and such plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.

(3) When a plea of guilty or no contest is accepted pursuant to this rule, the court shall, except as provided in subsections (C)(3) and (4), proceed with sentencing under Rule 32.

(C) Pleas of guilty and no contest in felony cases.

(1) Where in a felony case the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, pursuant to Rule 44 by appointed counsel, waives this right.

(2) In felony cases the court may refuse to accept a plea of guilty or a plea of no contest, and shall not accept such plea without first addressing the defendant personally and:

(a) Determining that he is making the plea voluntarily, with understanding of the nature of the charge and of the maximum penalty involved, and, if applicable, that he is not eligible for probation.

(b) Informing him of and determining that he understands the effect of his plea of guilty or no contest, and that the court upon acceptance of the plea may proceed with judgment and sentence.

(c) Informing him and determining that he understands that by his plea he is waiving his rights to jury trial, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to require the state to prove his guilt beyond a reasonable doubt at a trial at which he cannot be compelled to testify against himself.

(3) Until January 1, 1974, where a defendant pleads guilty or no contest to a capital offense a court composed of three judges shall examine the witnesses, determine the degree of crime and pronounce sentence accordingly. In all other cases the court need not take testimony upon a plea of guilty or no contest.

(4) With respect to aggravated murder committed on and after January 1, 1974, the defendant shall plead separately to the charge and to each specification, if any. A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting such plea the court shall so advise the defendant and determine that he understands the consequences of such plea.

If the indictment contains no specification, and a plea of guilty or no contest to the charge is accepted, the court shall impose the sentence provided by law.

If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.

If the indictment contains one or more specifications which are not dismissed upon acceptance of a plea of guilty or no contest to the charge, or if pleas of guilty or no contest to both the charge and one or more specifications are accepted, a court composed of three judges shall: (1) determine whether the offense was aggravated murder or a lesser offense; and (b) if the offense is determined to have been a lesser offense, impose sentence accordingly; or (c) if the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.

(D) Misdemeanor cases involving serious offenses. In misdemeanor cases involving serious offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first addressing the defendant personally and informing him of the effect of the pleas of guilty, no contest, and not guilty and determining that he is making the plea voluntarily. Where the defendant is unrepresented by counsel the court shall not accept a plea of guilty or no contest unless the defendant, after being readvised that he has the right to be represented by retained counsel, or pursuant to Rule 44 by appointed counsel, waives this right.

(E) Misdemeanor cases involving petty offenses. In misdemeanor cases involving petty offenses the court may refuse to accept a plea of guilty or no contest, and shall not accept such plea without first informing the defendant of the effect of the pleas of guilty, no contest, and not guilty.

The counsel provisions of Rule 44(B) and (C) apply to this subdivision.

(F) Negotiated plea in felony cases. When in felony cases, a negotiated plea of guilty or no contest to one or more offenses charged to one or more other or lesser offenses is offered, the underlying agreement upon which the plea is based shall be stated on the record in open court.

(G) Refusal of court to accept plea. If the court refuses to accept a plea of guilty or no contest, the court shall enter a plea of not guilty on behalf of the defendant. In such cases neither plea shall be admissible in evidence nor be the subject of comment by the prosecuting attorney or court.

(H) Defense of insanity. The defense of not guilty by reason of insanity must be pleaded at the time of arraignment, except that the court for good cause shown shall permit such a plea to be entered at any time before trial. A defendant who does not plead not guilty by reason of insanity is conclusively presumed to have been sane at the time of the commission of the offense charged. (Ohio Rules of Criminal Procedure, p. 532-533).

STATEMENT OF THE CASE

On June 7, 1974, two killings were perpetrated on the eastside of Columbus, Ohio. Herman T. Anderson was shot while employed as a security guard at Rollerland Skating Rink, 818 East Mound Street. David Martin, a cab driver, was found mortally wounded in a taxicab on Denton Alley, approximately fourteen blocks away and within ten to fifteen minutes of the first slaying.

On August 7, 1974, a Grand Jury indicted the petitioner on two counts of aggravated murder in violation of Ohio Revised Code Section 2903.03. That indictment read in pertinent part as follows:

"FIRST COUNT

"***(T)hat Taylor Hancock, Jr. ***did purposely and with prior calculation and design, cause the death of Herman T. Anderson,

"SECOND COUNT

"And *** that Taylor Hancock, Jr. *** did purposely cause the death of David Martin, while committing Robbery."

On September 5, 1974, the Indictment was amended by the Grand Jury to include the following specifications; which enhanced the charges against the petitioner to be punishable by death.

SPECIFICATION 1 to the First Court under Section 2929.04(A)(5), Revised Code, in compliance with Section 2941.14, Revised Code: The Grand Jurors further find and specify that said offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender;
SPECIFICATION 1 to the Second Count under Section 2929.04(A)(3), Revised Code, in compliance with Section 2941.14, Revised Code: The Grand Jurors further find and specify that said offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender;
SPECIFICATION 2 to the Second Count under Section 2929.04(A)(5), Revised Code, in compliance with Section 2941.14, Revised Code: The Grand Jurors further find and specify that said offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender;
SPECIFICATION 3 to the Second Count under Section 2929.04(A)(7), Revised Code, in compliance with Section 2941.14, Revised Code: The Grand Jurors further find and specify that said offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery.

As to the first count, petitioner was convicted on the basis of the eyewitness testimony of Henry Wheatly, a co-worker of the decedent, security guard. Mr. Wheatly testified that a man confronted decedent Anderson, said "I told you I'd be back" and held what the witness described as a black object which looked like a cane. The witness then heard a shot, saw Anderson fall, and ran outside the rink. From this vantage point, the only characteristic of the assailant which the witness could describe was "knots" in his hair. (Reel 5, 2:22). Police later presented "3 or 4" photos to the witness. Mr. Wheatley indicated that the officers represented to him that they felt that one of the photographs was that of the assailant. (Reel 5, 2:32:45). Only one of the photos pictured a man with "knotted" hair. (Reel 7, 10:21:29). The witness identified this picture, that of the petitioner, as the assailant.

Karen Lawson, age 17, also offered eyewitness testimony only to the effect that the assailant was a light-skinned, shirtless black man. (Reel 7, 9:39:27).

Additional evidence from Gene Brush, of the Columbus Police Department indicated that one Eddy Ivory had made an identification of a photo of one Carlton Enoch as the assailant. (Reel 18, 4:19:00). Petitioner was unable to obtain by subpoena the appearance at trial of Ivory.

The sole basis for the conviction under Count 2 was two ballistics reports: Columbus Police Department and Bureau of Criminal Identification reports both indicated that the bullets used in the two killings came from the same gun. The reports, however, conflicted in that one indicated that the bullets had six (6) lands and grooves, (Reel 22, 4:09:21) and the other report indicated that the bullets had four (4) lands and groves, (Reel 19, 10:04:30). No weapon was introduced by the State.

Petitioner presented two alibi witnesses in addition to himself, whose testimony showed that petitioner was at the residence of one of the alibi witnesses both at and after times of the killings. (Reel 22, 10:01:20 and Reel 23, 10:40:30).

The jury found the petitioner guilty of the murder of the security guard with prior calculation and design. The jury also returned a guilty verdict as to the only aggravating circumstance (specification) with regard to this charge, i.e. that the killing of the guard was part of a course of conduct involving the purposeful killing of two or more persons.

The jury also found the petitioner guilty of the purposeful killing of the taxicab driver while in the commission of a robbery. However, the jury found the petitioner not guilty of the specification to the count of having killed the taxicab driver while in the commission of a robbery.

The jury returned verdicts of guilty as to the other two specifications to Count 2. The petitioner was sentenced to death by the Trial Court.

Petitioner moved at the trial level to strike the aggravating specifications on the basis that the Ohio death penalty statute is unconstitutional. The Trial Court overruled this motion (Reel 3, 10:49:15; Tr-9), and this argument was similarly rejected by the Ohio Supreme Court. 48 Ohio St. 2d at 152.

Petitioner also objected to the Trial Court's prohibition against inquiring into the attitudes of potential jurors regarding the death penalty. (Reel 3, 10:46; Tr-12). The Ohio Supreme Court subsequently denied rehearing of petitioner's proposition of law that:

> In a prosecution for aggravated murder with specifications, questions to the potential jurors regarding their attitudes toward the death penalty are within the permissible scope of voir dire. A Trial Court may not deny counsel for either party the opportunity to examine into a prospective juror's ability to sit as a fair and impartial juror.

Petitioner also filed a motion to suppress the identification of petitioner by witnesses Wheatley and Lawson. (R-18). This motion was overruled by the Trial Court. (Reel 7, 10:40; Tr-10). The Ohio Supreme Court considered and rejected petitioner's argument that the identifications were constitutionally impermissible. 48 Ohio St. 2d at 151.

Petitioner also filed a post-trial motion for acquittal, (R-41), based on the return by the jury of inconsistent verdicts, on the one hand finding petitioner guilty of the substantive offense of aggravated murder under Count 2 committed during a robbery and not guilty of the aggravating specification that the killing took place while petitioner was committing aggravated robbery. (Under Ohio law a robbery is automatically "aggravated" if a firearm is used.) The Trial Court overruled this motion. (R-52). The Supreme Court of Ohio said that this situation did not constitute reversible error. 48 Ohio St. 2d at 149.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A DEFENDANT IN A CRIMINAL CASE CAN BE SENTENCED TO DEATH FOR A MURDER WHILE IN THE COURSE OF A ROBBERY WHEN THE JURY HAS FOUND HIM NOT GUILTY OF THE SPECIFICATION OF HAVING COMMITTED THE MURDER IN THE COURSE OF A ROBBERY.

Petitioner was convicted of aggravated murder with specifications and sentenced to death, pursuant to Ohio's death penalty statutes. The portion of the aggravated murder under which petitioner was convicted reads as follows:

> 2903.01 Aggravated Murder.
> ...(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

Despite convicting petitioner of violating this statute, the jury simultaneously returned a verdict of not guilty of specification number seven of the Ohio death penalty statute, which reads:

> 2929.04 Criteria for imposing death or imprisonment for a capital offense.
> (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and is proved beyond a reasonable doubt:
> ...
> (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, arson, aggravated robbery, or aggravated burglary.

Petitioner maintains that in returning a general verdict of guilty of murder while committing a robbery and simultaneously returning a verdict of not guilty of the specification of committing a murder while committing aggravated robbery, the jury returned an inconsistent verdict. Inasmuch as the facts of the instant case illustrate that such a finding of fact is a logical impossibility, petitioner argues that the verdict evidences confusion and irresponsiveness to the issues on the part of the jury with respect to the 2nd count of the indictment, and urges that his conviction be reversed. Evidence produced at trial indicated that the slain taxicab driver had been robbed of money and jewelry. Ohio's aggravated robbery statute set out below makes it clear that any robbery which occurred on these facts must necessarily have been an aggravated robbery, since death resulted:

> 2911.01 Aggravated Robbery
> (A) No person, in attempting or committing a theft offense as defined in section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:
> (1) Have a deadly weapon or dangerous ordnance as defined in sect-on 2923.11 of the Revised Code on or about his person or under his control;
> (2) Inflict, or attempt to inflict serious physical harm on another...

Consequently, petitioner urges that the verdicts returned in the instant case are in irreconciliable conflict, and the basing of a death sentence upon the jury's verdict of guilty of aggravated murder would represent a substantial injustice and is so offensive to due process of law as to be unconscionable.

The leading case on inconsistency in a criminal verdict is Dunn v. United States, 284 U.S. 390 (1932). The Dunn case established the basic principle, since followed by most jurisdictions, that consistency among different counts of a jury verdict is unnecessary, if convictions on each could be maintained in separate trials. The Court observed that "each count in an indictment is regarded as if it was a separate indictment." Dunn, supra, p. 393. Such, however, is not the situation in the case at bar. Here the inconsistency is within the same count of the indictment and in fact is a direct contradiction of verdicts on precisely the same factual question. The verdicts cannot be reconciled, the jury having concluded that petitioner both did and did not commit a murder while committing an aggravated robbery. The finding of the jury in the instant case could not have been maintained in separate trials. In his lengthy dissent in Dunn, Justice Butter formulated the basis of his opinion by citing other examples of verdict inconsistency, noting that in civil cases, where there is a conflict between a special and general verdict, the special verdict must prevail. Petitioner argues that under Ohio's death penalty statute, the submission of a list of possible specifications to the jury of which they must find defendant guilty of at least one in order to involve the death penalty, is in effect a submission of special verdicts which will accompany the general verdict. Accordingly, the procedure under Ohio's death penalty scheme is much more closely analogous to Justice Butter's example of general and special verdicts in a civil case, than to separate counts of an indictment, as in Dunn. Because the jury returned a verdict of not guilty in its special finding, thereby concluding that the State did not prove, beyond a reasonable doubt, that the defendant did commit a murder while committing an aggravated robbery, the special finding should control, and petitioner's conviction should be reversed, and his sentence of death set aside, since mass murder forms the only basis for imposing the death penalty upon the first count.

Despite a substantial amount of federal case law indicating that a verdict which is internally inconsistent as to the same count must be reversed, the Ohio Supreme Court recently affirmed such a conviction in another death penalty case, State v. Perryman, 49 Ohio St. 2d 14 (1976). Headnote 3 of that case, which involved a virtually identical inconsistency to the instant case reads:

> Where a jury convicts a defendant of an aggravated murder committed in the course of an aggravated robbery, and where that defendant is concurrently acquitted of a specification indicting him for identical behavior, the general verdict is not invalid.

By way of explanation for this holding, the Court offered only the following:

> In allowing the verdict to stand, we believe the lower court committed no error. The death sentence in the instant case was based on a guilty verdict as to count one and a guilty verdict as to specification one. The sentence was not based on an alleged inconsistency. The guilty verdict for count one reflects the jury's determinations rendered as to the respective specifications can not change that finding of guilt. Furthermore, as indicated in R.C. 2929.03(A), one may be convicted of aggravated murder, the principal charge, without a specification. Thus, the conviction of aggravated murder is not dependent upon findings for the specifications thereto. Specifications are considered after, and in addition to, the finding of guilt on the principal charge. If more than one specification is charged, a finding of guilty on only one such specification is all that is required in order for the court to render the death sentence.

Petitioner contends that the Court's explanation is inadequate to justify a sentence of death. The Court's observation that a guilty verdict as to the felony murder charge itself is conclusive of that fact, is negated by the return of a verdict of not guilty on an identical specification. The not guilty verdict is a clear statement of belief by the jurors that defendant not commit a murder while committing a robbery, a finding of fact directly contradictory to that which is needed to prove the general charge of felony - murder. When the judicial system seeks to invoke the most severe penalty available to our society, it must necessarily be predicated upon a crystal - clear finding of facts. Petitioner urges that there is no room for error or uncertainty in the fact-finding stage of a death penalty trial. To allow a death sentence to stand upon such an obvious example of jury confusion as to the facts is repugnant to the concept of due process of law.

As has been noted, a number of federal and Ohio courts have passed on related problems of verdict inconsistency. Among the tests which have been developed and utilized by courts in assessing the validity of such inconsistent verdicts have been: 1) whether the conflicting verdicts are irreconciliably inconsistent (Bass v. Dehner, 103 F. 2d 28 (10th Cir. 1939); (Thomas v. United States, (5th Cir. 1963); 2) Whether there was distinct

evidence which supported the general verdict but not the special verdict, (Boyle v. United States, 22 F. 2d 547 (8th Cir. 1927); 3) whether the special verdict negatived an essential element of the general verdict, (Rosenthal v. United States, 276 F. 714 (9th Cir. 1921); and 4) whether the verdicts strongly indicated juror confusion, (Fuller v. United States, 407 F. 2d 1199 (D.C. Cir. 1968).

Under any of these analysis, the verdicts in the instant case call for reversal. Certainly there is no way to logically reconcile the verdicts, as the factual questions involved in the two verdicts are identical. The 5th Circuit in Thomas reversed convictions of a defendant for smuggling marijuana into the United States and for failing to pay the transfer tax on the goods, noting that the latter offense necessitated a finding that the goods were not smuggled. Consequently, there was no rational basis on which the verdicts could be reconciled, the verdicts being predicated as they were on contradictory findings of fact. The inconsistency in the instant case was of course even more blatant than in Thomas, and makes an even stronger case for reversal.

Likewise the instant case meets the tests of Boyle and Rosenthal, supra. There was absolutely no distinction in the evidence necessary to prove the general and the special charge, because the charges were identical. Further, the return of a not guilty verdict on the special charge directly negated the general verdict that defendant was guilty of murder while committing a robbery.

Finally, and perhaps most importantly, petitioner argues that the conflicting verdicts are strongly indicative of confusion on the part of the jury. As the D.C. Circuit noted in Fuller, supra, a reversal is mandated:

> Where circumstances suggest that the jury was confused as to what constituted the particular offenses. Fuller, supra,p. 1232.

Clearly, such juror confusion is obvious on the face of the record in the instant case. The special verdict of not guilty suggests that the jury was confused as to the principle of felony-murder. The verdict raised serious questions about the jury's belief that the defendant had committed

an aggravated murder under Section 2903.01, Ohio Revised Code. But for the finding of aggravated murder, a death penalty could not have been imposed. The danger involved in allowing the inconsistent findings of fact to stand thus takes an overwhelming importance.

Accordingly, petitioner urges this Court to act upon his case in light of the gravity of the subject and the substantial possibility that the jury was unclear as to its findings of fact. Due process of law mandates that a sentence of death not be imposed upon speculation or uncertainty. The importance of the issue of manifest: reversal on the count in question would negate both aggravating specifications on Count two, and the death penalty would be precluded. Such a result is the only conscionable one, and petitioner therefore seeks reversal.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE TRIAL COURT'S PROHIBITION OF INQUIRY BY COUNSEL INTO THE ATTITUDES OF POTENTIAL JURORS REGARDING CAPITAL PUNISHMENT VIOLATES PETITIONER'S CONSTITUTIONAL FAIR TRIAL RIGHTS.....

A. Restriction of Voir Dire Violates Petitioner's Fifth, Sixth and Fourteenth Amendment Rights to Trial by a Fair and Impartial Jury.

One standing criminally accused is assured of a trial by a fair and imparital jury. United States Constitution, Amendment Six. This principle is among the most fundamental and important in the American criminal justice system. Turner v. Louisiana, 379 U.S. 471 (1965); Groppi v. Wisconsin, 400 U.S. 508 (1971). It has long been recognized in Ohio that:

> the right of trial by jury guaranteed by the Constitution carries with it by necessary implication the right to a trial by a jury composed of unbiased and unprejudiced jurors. Lingafelter v. Moore, 95 Ohio St. 384 (1917) at 387.

And as succinctly stated by the United States Court of Appeals for the Fifth Circuit:

> At stake is the party's right guaranteed by the Sixth Amendment to an impartial jury; the principal way this right is implemented is through the system of challenges exercised during the voir dire of prospective jurors. United States v. Nell, 526 F. 2d 1223 (C.A. 5 1976) at 1229.

This passage expressly recognizes the uselessness of fair trial rights unless affirmatively protected via voir dire.

The state of law in Ohio regarding voir dire in a capital case is one of confusion, brought on by diametrically conflicting statements from the Ohio Supreme Court. That Court said in State v. Bayless, 48 Ohio St. 2d 73 (1976), decided November 24, 1976, that:

> (V)eniremen who stated that they were opposed to capital punishment, but could follow their oath and vote in accordance with the evidence were not excused. Indeed, the record of the voir dire in this case provides a convincing demonstration of the need for such inquiries in capital cases. 48 Ohio St. 2d at 88 (emphasis added.)

In Bayless, voir dire on the death penalty was allowed and the defendant contended it should not have been permitted. The Ohio Surpeme Court rejected defendant's claim stating that such voir dire is necessary to provide a fair and impartial jury.

The Court reversed this position one month later in State v. Lane, 49 Ohio St. 2d 77 (1976), decided on December 30, 1976, by saying that "a general instruction during voir dire may be an adequate substitute for individualized inquiry." 49 Ohio St. 2d at 80. In this case the Court affirmed the conviction and sentence of the appellant who objected because no inquiry was allowed.

The Court also decided December 30 another case which added to the confusion, apparently agreeing with State v. Bayless and contradicting State v. Lane. The Court asserted that "(A)n inquiry into the opinion, and attitudes of prospective veniremen is not only proper, but essential." State v. Lockett, 49 Ohio St. 2d 48 (1976) at 56. This opinion affirmed the conviction and sentence of an appellant who objected to the allowance of inquiry. Allowance of inquiry was also upheld in State v. Woods, 48 Ohio St. 2d 127 (1976) at 130.

Not only do these contradictory pronouncements embody a struggle to uphold death sentences (which further weakens arguments on behalf of the constitutionality of Ohio's death penalty) they leave Ohio's trial courts in a state of confusion on this issue. It seems clear, however, that such inquiry should and must be permitted. In the present case, the denial to petitioner of the opportunity to probe the attitudes of prospective jurors on capital punishment was in contravention of principles set forth by this Court in a long line of cases.

The importance of the feelings of prospective jurors on capital punishment was most notably recognized in Witherspoon v. Illinois, 391 U.S. 510 (1968). Unlike the Witherspoon situation, petitioner is not challenging the removal for cause of jurors evidencing scruples against the death penalty. Rather, the opposite is true: petitioner challenges the denial to him of the right to ferret out those jurors who were biased in favor of the death penalty. That such prospective jurors do exist is clear: two such persons were excused for cause at the trial level in State v. Bayless, supra at 88. Obviously, any opportunity to discover such jurors in petitioner's case was effectively precluded.

Voir dire examination, as noted earlier, is at the very core of the right to a fair and imparital trial. The American Bar Association Project

on Standards for Criminal Justice has propounded the following relating to voir dire:

> Voir dire examination.
> A voir dire examination should be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. Trial By Jury, Tentative Draft (1968).

Petitioner's right to both challenges for cause and peremptory challenges (regarding the death penalty issue) were denied by the Trial Court, and it is petitioner's contention that denial of each right violated his rights as secured by the Fifth, Sixth, and Fourteenth Amendments.

1. Challenges for Cause

When a juror is dismissed as the result of a challenge for cause, it evidences his inability to serve fairly and impartially. Criminal defendants have a constitutional right to challenge for cause; to deny that right would be to deny the use of the only vehicle of assurance of an impartial jury. Furthermore, the right to challenge for cause must, of logical necessity, be supported by the right to question jurors regarding areas of possible bias. An "informed judgment on the question of actual bias" is required. United States v. Nell, supra, at 1229. See also this Court's opinion in Irvin v. Dowd, 366 U.S. 717 (1961), which clearly implies that a defendant has a constitutional right to both effective voir dire and challenges for cause. But other cases have stated in explicit terms that which was implied in Irvin.

In one of the landmark cases in this area of criminal law, this Court said that:

> (t)he right to examine jurors on voir dire as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious nature (state case citations omitted). Aldridge v. United States, 283 U.S. 308 (1931).

Lewis v. United States, 146 U.S. 370 (1892) also recognized the importance of challenges to jurors in the constitutional setting; and the above reasoning from Aldridge v. United States was elevated to the level of Fourteenth Amendment Due Process in Ham v. South Carolina, 409 U.S. 524 (1973).

Although the cases cited in the preceding paragraph deal with allowance of voir dire questioning on the issue of racial bias, petitioner contends that their principles are made directly applicable to the present case by Morford v. United States, 339 U.S. 258 (1950). In Morford, defense counsel was not permitted, in a trial for wilfully failing to comply with the mandate of a Congressional subpoena, to inquire into the ability of prospective jurors who were government employees to sit impartially in light of Executive Order 9835 (the so-called "Loyalty Order"). This Court reversed Morford's conviction because of this prohibition. In a per curiam opinion, the Court said:

> We said in Dennis (v. United States, 339 U.S. 162 (1950)) that 'Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury...' (Dennis, at 171-72.) Since that opportuntiy was denied in this case, the petition for writ of certiorari is granted and the judgment... is reversed. 339 U.S. at 259.

As in Morford, petitioner here was denied the "opportunity to prove actual bias." And as in Morford, the fact that there may have in fact been no bias is of no moment; whether or not petitioner (or Morford) was tried by an impartial jury is nothing more than speculation.

2. Peremptory Challenges

While it seems clear, then that defendants have a right to challenge for cause (and to question jurors to determine grounds for such challenges), it has been claimed that the common-law practice of peremptory challenge does not rise to the level of constitutional right. Frazier v. United States, 335 U.S. 497 (1948) at 505-06 (note 11). However, the same footnote in Frazier emphasized that peremptory challenges in a capital case are fundamental. The obvious and repetitive distinction in this three-paragraph footnote, while admittedly dicta, does indicate that peremptory challenges in capital cases are of constitutional magnitude. See also Pointer v. United States, 151 U.S. 396 (1894) at 408.

Even were it to be conceded that no absolute constitutional right to the peremptory challenge exists, once rule, case law, or statute provides for such challenges, failure to allow them is a denial of due process. Once

granted, "the denial or impairment of the right (of peremptory challenge) is reversible error without a showing of prejudice." Swain v. Alabama, 380 U.S. 202 (1965) at 219. Denial of inquiry necessary to exercise peremptory challenges is unquestionably a serious "impairment" of that right (available to an accused via Ohio Rule Crim. P. 24). See Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 Stan. L. Rev. 545 (1975).

B. Restriction of Voir Dire is Prejudicial by Nature, and No Showing of Prejudice by Petitioner is Required.

Prejudice inheres in the unconstitutional limiting of voir dire questioning. See Morford v. United States, Swain v. Alabama, and Ham v. South Carolina, all supra. Actual prejudice cannot be proved because the action of the Trial Court was exclusionary in nature; harm cannot be shown in a blank record.

In Peters v. Kiff, 407 U.S. 493 (1972), this Court granted a white petitioner a writ of habeas corpus because blacks were systematically excluded from the grand jury. Whether or not this fact prejudiced the defendant was not a matter on which the Court would speculate:

> Respondent argues that even if the grant and petit juries were unconstitutionally selected, petitioner is not entitled to relief... It is argued that a Negro defendant's right to challenge the exclusion of Negroes from jury service rests on a presumption that a jury so constituted will be prejudiced against him; that no presumption is available to a white defendant, and consequently that a white defendant must introduce affirmative evidence of actual harm in order to establish a basis for relief. That argument takes too narrow a view of the kinds of harm that flow from discrimination in jury selection. 407 U.S. at 498.

It cannot be countered that probing capital punishment beliefs of jurors is improper in Ohio since the function of a jury is that of fact-finder as to guilt only, and not as to penalty; for as this Court stated in Woodson v. North Carolina, U.S. , 49 L. Ed. 2d 944 (1976) at 960, that:

> In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict.

Determination of who is to live and who is to die by the jury under the North Carolina system is described by the Court as "inevitable." Id. The same would apply to juries in Ohio, where such juries ostensibly do not determine punishment, as applies to juries in North Carolina, where such juries automatically determine punishment.

That jurors whose feelings on capital punishment would render them unable to judge fairly do indeed exist is apparent from State v. Bayless, 48 Ohio St. 2d 73 (1976) at 88, and is dictated by common sense; petitioner was denied the chance to find and exclude such persons; and such denial is inherently prejudicial.

C. Restriction of Voir Dire Violates Petitioner's Sixth Amendment Right to Assistance of Counsel.

In addition to its encroachment of petitioner's fair trial rights, the practice currently complained of violated petitioner's Sixth Amendment right to effective representation by counsel.

This Court, in Herring v. New York, 422 U.S. 853 (1975), reversed a conviction for failure to allow counsel in a bench trial to propound closing argument. It was noted that "closing argument is a basic element of the adversary fact-finding process in the criminal trial". 422 U.S. at 836. In support of its holding, the Court cited A.B.A. Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function. Their same Standards say that the defense attorney should prepare in advance to "discharge effectively his function in the selection of the jury including... the exercise of ... challenges." Defense Standard 7.2(a). Thus the conduction of voir dire by counsel, once undertaken, is an important trial function to insure an impartial trier of fact. Swain v. Alabama, supra. To be depirved of effective use of voir dire, once voir dire is allowed, is to deny the client effective representation by his attorney, in contravention of the principles of Herring v. New York, supra.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER, ON THE FACTS OF THIS CASE, THE PHOTOGRAPHIC IDENTIFICATIONS MADE OF PETITIONER WERE SO IMPERMISSIBLY SUGGESTIVE SO AS TO CREATE A SUBSTANTIAL RISK OF IRREPARABLE MISIDENTIFICATION, AND HENCE VIOLATE PETITIONER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

In the case of Stovall v. Denno, (1967) 388 U.S. 293, 87 S. Ct. 1967 this Court held that an identification is invalid whenever the confrontation is so unnecessarily suggestive and conducive to irreparable mistaken identification that an accused is denied due process of law. In Simmons v. United States, (1968) 390 U.S. 377, 88 S. Ct. 967, the Court considered the application of its ruling in Stovall to photographic identification. The standard set forth was as follows:

> ***(T)hat each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 390 U.S. at 384.

It was further noted that certain identification procedures present inherent danger:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pcitures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification. 390 U.S. at 383.

From the testimony of Henry Wheatley and Karen Lawson it is apparent that the very dangers which were recognized in Simmons and in U.S. v. Wade, 388 U.S. 218 (1967) were present in the identification procedure used in this case. Wheatley testified that from three or four pictures, he was told by officers to "Pick out the picture". (Reel 5, 2:32:00, Tr-32). The witness was also informed by officers that "We think we have the man," (Reel 5, 2:32:25; Tr-33), and he admitted that he may have been informed which photograph represented the man that police felt "did it". (Reel 5, 2:32:45; Tr-33). This testimony clearly demonstrates contravention of at least one Simmons' principle; i.e. the officers indicated to the witness that one of the pictures that the witness was viewing was of the man police believed to have committed the crime.

The facts of this case clearly indicate a violation of the principles of United States v. Wade, supra, at 233, in that the witness recognized two of the persons pictured in the group of four photographs shown to him. The petitioner was not an individual known to the witness. (Reel 5, 2:35; Tr-33, Reel 5, 2:36; Tr-36).

Furthermore, the witness signed the photograph that he identified as that of the assailant on the same date as did Karen Lawson, (Reel 5, 2:45; Tr-41; Reel 7, 9:58:00; Tr-81). Which witness signed first is not readily apparent, but it is obvious that the second signer's impression of the correctness, of his I.D., garnered from seeing a signature already on the picture he selects, would lead to a substantial likelihood that:

> Once (he)... has picked out the accused... he is not likely to go back on his word later on. United States v. Wade, supra, at 229, quoting from Williams Hammelman, Identification Parades (1963), 479-490.

Thus the witness' reinforced belief in his correctness leads more conclusively to a substantial likelihood of irreparable misidentification.

Another similar Wade-Simmons principle was contravened when the witness and another civilian witness went through photographs together, and in fact confirmed one another's identification. (Reel 5, 2:47; Tr-46, 47). See Simmons v. United States, supra, at 385, and United States v. Wade, supra, at 234. Witnesses identifying a criminal in the presence of each other is a procedure "fraught with dangers of suggestion". Id.

In addition, the witness told police that the most prominent trait of the assailant was "knotted" hair. (Reel 5, 2:48; Tr-43) and the record exhibits which is part of this case shows that only one photograph displayed to the witness had knotted hair: that of petitioner. (Reel 7, 10: 21:30). This constitutes impermissible "emphasis" of that photo. Simmons v. United States, supra, at 383.

The second witness, Karen Lawson, recognized the persons pictured in four of the six photos that were displayed to her by police. (Reel 7, 9:46; Tr-71, Reel 7, 9:47; Tr-72, Reel 7, 9:47; Tr-73, Reel 7, 9:48; Tr-73). She was likewise informed that one photograph was of a suspect then in custody. (Reel 7, 9:44:30; Tr-69). She was told, after she had picked out petitioner's picture, that he was indeed the man. (Reel 7, 10:02; Tr-83). Although it was known that the assailant was a young man some photos were of older men. (Reel 7, 10:05; Tr-85). Those other than petitioner's were black and white photographs. (Reel 7, 10:04:30; Tr-85). Only the petitioner's photo was in color.

The above circumstances cannot help but be impermissibly suggestive; but when coupled with the facts which severely limited the ability of the witnesses to identify the assailant in the first instance, they constitute identifications which cannot be allowed consistently with due process. Witness Wheatley was 73 years old. (Reel 5, 2:22:55; Tr-25). He said he got only a glimpse of the assailant. (Reel 5:2:52; Tr. 45). He said that at the time of the assault, he "didn't pay any attention" to the assailant. (Reel 5, 2:45:45; Tr-41). After the assailant fled, he could see only a "head hobbling toward Main Street." (Reel 5, 2:47; Tr-42, 43). And, as noted the most prominent physical characterisric of the assailant was "knots" in his hair. (Reel 5, 2:48; Tr-43).

Witness Karen Lawson was 17 years of age. (Reel 7, 9:38; Tr-61). She was 150 paces from the place of the shooting. (Reel 7, 9:39; Tr-62). She did not see the picture she identified as the assailant until one month after the shooting. (Reel 7, 9:49; Tr-74). Her identification was based only on the facts that the assailant was shirtless, (Reel 7, 9:41; Tr-67), and had a light complexion. (Reel 7, 9:42; Tr- 68).

Given all of the above, plus the fact that there was a large crowd in the immediate vicinity of the shooting, (Reel 7, 9:39; Tr-64), one is lead to the inexorable conclusion that the witness' initial opportunity to view the assailant was poor, and that subsequent identification procedures were very suggestive. As a consequence, there has been created a substantial risk of irreparable misidentification, and petitioner seeks reversal on those grounds.

IV. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER OHIO'S STATUTORY SCHEME FOR IMPOSITION OF THE DEATH PENALTY, AS CONSTRUED BY THE OHIO SUPREME COURT, RENDERS CAPITAL SENTENCES IMPOSED UNDER IT CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. The Mitigating Factors Contained in the Ohio Statute, as Written and Construed, Are Clearly Inadequate to Accord the Required Significance to Relevant Aspects of a Defendant's Character and Record or to the Circumstances of a Particular Offense.

It has been recognized that "(i)ndividual culpability is not always measured by the category of the crime committed." Furman v. Georgia, 408 U.S. 238 (1972) at 402 (Burger, C.J., dissenting). This principle was lenttressed by the decisions of this Court in Roberts v. Louisiana, U.S., , 49 L. Ed. 2d 974 (1976) and Woodson v. North Carolina, U.S. , 49 L.Ed. 2d 944, which indicated that mandatory death penalty statutes did not allow for sufficient consideration of a defendant or his crime to comport with the basic principles of Furman v. Georgia, 408 U.S. 238 (1972). Petitioner contends that the Ohio statutes, Ohio Revised Code Sections 2929.02-.04, are both improperly restrictive and patently unclear, thus rendering them unconstitutional.

Following this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), Ohio reenacted capital punishment statutes in the following form:

> 2903.01 Aggravated murder.
> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
> (C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

> 2929.02 Penalties for murder.
> (A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.
> (B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a presentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statements, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or court in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the oevised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderence (preponderance) of the evidence:

> (1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
> (3) The offense was a primary product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Petitioner challenges the constitutional validity of these statutes.

Under Ohio Revised Code Section 2929.04(B)(3), the death penalty is precluded if:

> (t)he offense was primarily the product of the offender's psychosis or mental deficiency though such condition is insiffucient to establish the defense of insanity.

Nowhere in the Code is "mental deficiency" defined. However, in the initial case decided by the Ohio Supreme Court under the Ohio statute, it was held that the term meant only a "low or defective state of intelligency." State v. Bayless,48 Ohio St. 2d 73 (1976) at 96. Thus no consideration of any other of a broad range of mental problems was possible. Perhaps realizing that this narrow interpretation of "mental deficiency" rendered that statute constitutionally suspect, the Court, at the next opportunity, expanded the definition to:

> allow... the broadest possible latitude in the examination of the defendant's mental state and mental capacity for purpose of the mitigation inquiry, excepting only legal insanity. (Emphasis added.) State v. Black, 48 Ohio St. 2d 262 (1976) at 268.

The Court noted that a restrictive interpretation of the term serves only to "bind the conscience of the Trial Court" to the defendant's detriment, and that "any mental state or incapacity may be considered." State v. Black, supra at 268.

Although the more expansive definition as promulgated in Black seems desirable, it is abundantly clear that the Black definition was totally ignored by the Ohio Court in subsequent cases. In State v. Bell, 48 Ohio St. 2d 270 (1976), decided the same day as Black, the Court affirmed the sentence of an appellant who was 16 years of age, involved with drugs, a slow learner, and with poor family and education lives; and despite an assertion (apparently cosmetic) that age was to be a "primary factor" in determining mental deficiency. State v. Bell, supra at 282, which statement directly contradicted an earlier observation that age had no bearing on any mitigating factor. State v. Bayless, supra, at 87n.

The Court next declined to apply its more liberal Black definition of "mental deficiency" in State v. Harris, 48 Ohio St. 2d 351 (1976), where a 17 year old sociopath was summarily held to be well within the bounds of mental sufficiency; in State v. Royster, 48 Ohio St. 2d 381 (1976), where a low intelligency appellant had his death sentence affirmed despite a contention of mental deficiency; and in State v. Lockett, 49 Ohio St. 2d 48 (1976) where another drug involved, low I.Q. appellant's contention of mental deficiency was dismissed, and death imposed on the defendant who was in a car two blocks away at the time of the shooting.

Not a single death sentence has been set aside by the Ohio Supreme Court because of a finding of mental defieiency, or for any other reason. Indeed, that Court has indicated to the Trial Courts of Ohio that its expanded definition of "mental deficiency" as contained in State v. Black, supra, is a mere platitude. Thus a defendant is placed in an uncertain position: he cannot adequately prepare to meet the burden of proof placed upon him by Ohio Rev. Code Section 2929.04 to show the existence of a mitigating circumstance since he cannot know exactly what he must show. A statute must, to comport with due process, be sufficiently definite that it is subject to ready and certain application. Ashton v. Kentucky, 384 U.S. 195 (1966). In this case it is not so definite. Furthermore, the most definite interpretation of the "mental deficiency" factor is the restrictive one set forth in State v. Bayless, supra.

It seems clear that meaningful consideration of a defendant's mental state is prohibited by both the statute itself and by its construction by the Ohio Supreme Court. It seems equally clear that this particular factor will be seldom if ever found to exist, thus making it largely illusory in practical effect.

Ohio's second mitigating circumstance exists when:

> (i)t is unlikely that the offense would have been committed, but for the fact that the offense was under duress, coercion, or strong provocation. Ohio Revised Code Section 2929.04(B)(2).

Under Ohio law, a sufficient degree of duress or coercion constitutes a complete defense to an otherwise criminal act. State v. Sappienza, 84 Ohio St. 63 (1911). Yet obviously the degree of stress required to establish this

mitigating factor must be less than that necessary to constitute a defense to the crime. See State v. Woods, 48 Ohio St. 2d 127 (1976), at 135. And as to this factor in general the Ohio Supreme Court said in Woods at 136:

> the question is not what effect such conduct would have upon an ordinary man but rather the effect upon the particular person toward whom such conduct is directed... (considering) all the surrounding circumstances.

Despite this language; the uncontroverted expert testimony showing Woods to be easily "dominated and controlled",and that he would not have committed the crime but for the co-defendant's domination, 48 Ohio St. 2d at 134; the fact that Wood's accomplice was a career criminal, older, and the instigating force in the crime; and reluctance of Woods to complete the crime, the Court affirmed Wood's sentence, thus demonstrating its own reluctance to find mitigating factors when they do exist. Granted that in applying this mitigating factor the proverbial line must be drawn somewhere short of the existence of an actual defense to the crime, Woods seems to leave no space for such a line to be drawn. In effect, then, Section 2929.04 lists a wholly illusory factor, "mitigating" in title only of little or no practical value.

The final mitigating circumstance in Ohio exists when "(t)he victim ... induced or facilitated the offense." Ohio Revised Code Section 2929.04 (B)(1). Petitioner submits that this provision is even more constrictive and more vauge than the other two mitigating factors.

It is, of course, true that while consent can be a defense to certain civil actions sounding in tort, Kahn v. Walton, 46 Ohio St. 195 (1889), it cannot be a defense to a prosecution for murder. But what of the situation in which a victim "induces" a murder? What must a victim do to invoke Section (B)(1)? Did the Ohio General Assembly intend for this section to preclude the execution of a "mercy killer" where the victim represented death at the defendant's hands? It seems hardly likely that such a mercy killer would be charged with any of the aggravating specifications of Ohio Revised Code Sections 2929.04(A)(1)-(7) in the first instance.

Is it enough that he assault the defendant, try to escape, or attempt to thwart the defendant's criminal plan? The Ohio Supreme Court implied that

this would not be sufficient in State v. Bayless, supra, at 76. If this is indeed not the case, then any inducement would necessarily constitute either self-defense or the lesser substantive offense of voluntary manslaughter, under which a defendant kills under stress or provocation. Thus, the space that inducement by a victim may present a mitigating circumstance is reduced to the point at which it is impracticable for any fact pattern to fit into it, and it would seem that this factor, too, is one which is much better "on paper" than in practical application. It should be noted that the Ohio Supreme Court has not to date considered a case which even necessitated the addressing of this issue -- and such cases will likely seldom be presented.

Given the limited scope of Ohio's three mitigating circumstances, the mitigating scheme viewed as a whole clearly fails to permit consideration of nearly enough factors to give "significance to relevant facts of the character and record of the individual offender or the circumstances of the particular offense." Woodson v. North Carolina, supra, at 961.

The Ohio Supreme Court has pointed out that Ohio's statute does not provide for consideration of the defendant's age, prior criminal record, a broad range of mental impairments, and defendant's actual conduct which may involve him substantively only through principles of complicity. State v. Bayless, supra, at 87n. These deficiencies in the scheme fall directly within the ambit of the quoted language from Woodson in the previous paragraph.

As discussed earlier, the Ohio Courts attempted to salvage the statute in State v. Bell, supra, by holding that age is a factor; but even ignoring the obvious contradictions on these issue between Bell and Bayless, and the reluctance to rely on age in sentencing as discussed earlier, is clear that age can be a factor only as it pertains to determining mental deficiency. (And as also previously discussed, mental deficiency is an extremely shadowy concept.)

The Ohio provision also fails in light of the requirements of Woodson, quoted supra, in that it makes no allowances for a defendant's character or prior. Although it is pointed out in State v. Bell, supra, at 281, that the preamble to the list of mitigating circumstances that those cir-

stances are to be considered in light of "the history, character, and condition of the offender," if examined in conjunction with the mitigating factors, such an instruction at best is superflous and at worst is an attempt to camoflage the true lack of breadth of the statute. How can one consider a defendant's character and record as it relates to the inducement or facilitation of the offense by a victim? Or as it relates to whether the offense was a product of mental deficiency? The defendant's character, record, etc., are exclusive factors, not modifying ones; they must be, if used, considered as separate elements, not as parts of others. The very structure of Section 2929.04(B) logically precludes such use.

Consequently it becomes apparent that the list of mitigating cirstances in subsection (B)(1), (B)(2), and (B)(3) are the only ones which realistically may be considered under the statute.

A defendant's actual role in the crime is likewise irrelevant under the Ohio law. See State v. Bayless, supra, at 87, noting that Florida scheme does contain such a factor. That this factor is not to be considered, witness State v. Lockett, 49 Ohio St. 2d 48 (1976), in which the defendant, who waited outside a robbery scene, death sentence was affirmed despite the fact that the "triggerman" received a life sentence. Lockett is precisely the type of case which should be modified on review notwithstanding precise compliance with aggravating and mitigating circumstances portions of the statute. While petitioner concedes that this Court has not held that comparative review of death sentences by state courts, as provided for in Georgia by Ga. Code Ann. Section 27-2537(C)(3)(1975 Supp.), is absolutely required, it is no accident that a case such as State v. Lockett, supra could have its death sentences "slip through" the Ohio courts unimpaired: with no procedure for considering the comparability of defendants capitally sentenced, and with a terribly narrow range of mitigating circumstances, the statute as currently written is truly incapable of preventing capital sentences from being imposed in a "random and unpredictable manner." Furman v. Georgia, supra, at 400 (Burger, C.J., dissenting).

The scope of Ohio's mitigating factors is so limited that Ohio has, in practical effect, mandatory death penalties for seven types of aggravated murder. The provisions of section 2929.04(B) can be applied so seldom that the Ohio provision is quite similar to the Louisiana statute nullified in Roberts v. Louisiana, supra. That statute provided for a mandatory death penalty for defendants convicted of five categories of homicide. Lou. St. Ann. - R.S. 14:30(1) through (5). The Ohio framework likewise resembles the North Carolina statute (North Car. Gen. Stats. Section 14-17) struck down in Woodson v. North Carolina, supra, in that death penalties for certain acts are automatic notwithstanding the existence of mitigating factors in the crime. The Louisiana statute referred to provides an interesting comparison to Ohio's capital punishment law.

Louisiana's re-enactment of a capital punishment statute punishes all first degree murders with death. First degree murder is defiend as follows:

> First degree murder. First degree murder is the killing of a human being:
> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; (or)
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
> For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer,judge, district attorney, assistant district attorney or district attorney's investigator.

While Ohio Revised Code Section 2929.04(A)(1) through (7) is couched in terms of "aggravating specifications", it is in substance the same as the statute

set forth above. Even though the specific circumstances are not identical in description or in scope, each statute is built upon the same tenets: though the Louisiana law is termed a "definition" (of first degree murder) and the Ohio law purports to list aggravating circumstances, the effect of the two provisions is identical. To insist otherwise would be to exalt form over substance. As just admitted, the two statutes do not cover precisely the same territory. They both, however, serve to set forth what types of homicides require a penalty of death. Indeed, Ohio's Tenth District Court of Appeals, in affirming petitioner's sentence, characterized the Ohio scheme as a mandatory death penalty:

> Judge Strausbaugh, in the opinion of... (State v. Harris, No. 75AP-195 (1975 Decisions, page 2075)... succinctly wrote: 'Accordingly, the new Ohio law provides for a mandatory death penalty in certain cases of murder dependent upon the factual determinations made. The death penalty, being mandatory, rather than discretionary, is not precluded by Furman.'

More similarly between the Ohio statutes and admittedly mandatory penalties becomes apparent in the "felony murder" situation. Under Revised Code Section 2903.01(B) one of the elements that can make a homicide offense one of aggravated murder is that situation in which the killing takes place where the defendant is committing, or attempting, or fleeing the scene of, certain specified felonies. Under Code Section 2929.04(A)(7), an aggravating specification is present when the killing takes place while a defendant is committing, attempting, or fleeing the scene of, certain specified felonies, which are basically the same as or similar to those felonies listed in Section 2903.01(B). Thus a situation exists where the same act can furnish both a required element of the crime itself and an aggravating specification. Indeed, a majority of the death cases decided by the Ohio Supreme Court were those of felony murder defendants. The existence of the above situation presents twofold problems: first, a trier of fact can, as a sort of compromise, convict of the crime (on a felony murder theory) and acquit of a specification which lists the same offense. Such a possibility clearly deprives a defendant of the substantive due process of law afforded him by the

Fifth and Fourteenth Amendments. Second, such a statutory structure removes the necessity of defendant's being guilty of something above and beyond the crime itself in order to put to death. Removal of the additional step is more than the statute can bear and still make sufficient differentiation between defendants and their acts.

The State would obviously argue, notwithstanding the undeniably identical purposes and arrangement of the Ohio and Louisiana provisions, that the Ohio statute's saving grace is its allowance for the mitigation process to preclude the death sentence. However, as has been previously illustrated, the circumstances permitted to be considered are so unclear in their terms as to violate due process, and so narrow in their scope as to fall woefully short of providing meaningful guidelines to the sentencing agent.

This Court said in Jurek v. Texas, U.S. , 49 L. Ed. 2d 929, that a sentencing authority "must be allowed to consider on the basis of all relevant evidence... why a death sentence should... not be imposed". 49 L. Ed. 2d at 938. Ohio's mitigating factors clearly do not permit such a consideration. They represent a pitifully insufficient attempt to circumvent the mandates of Furman v. Georgia, supra; they do not allow for any kind of meaningful scrutiny of the defendant, his crime, and his character; they are, in their inadequacy, serving to make the remainder of the Ohio death statute mandatory in both character and in substance; and they, in all the foregoing respects, consequently render the entire statute void in contravention of the Eighth and Fourteenth Amendments to the United States Constitution.

B. Ohio's Death Penalty Statute Chills the Exercise by Defendants of Rights Secured Them by the Sixth and Fourteenth Amendments.

A compulsory waiver problem is presented by Ohio R. Crim. P. 11(C)(4), regarding pleas of guilty, which provides:

> If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interest of justice.

This rule, following the rationale of U.S. v. Jackson, supra, injects back into the Ohio scheme more impermissible discretion, and provides coercion upon a defendant to waive his right to be proved guilty beyond a reasonable doubt at a fair and impartial trial. The judge's perrogative to exercise his option to dismiss the aggravating specifications are obviously unrelated to a defendant's character, crime, or culpability: the only guideline of "in the interest of justice" is not only vague and impossible or uniform application, but completely arbitrary and allows for use rewarding a defendant for waiver of his rights. The compelled waiver cannot stand under Jackson; and the discretion permitted clearly does not comport with the guidelines of Furman v. Georgia, supra.

C. The Excessive Opportunity for the Injection of, and Excessive Use of Discretion by the Prosecuting Attorney Renders the Ohio Statute Violative of the Principles of Furman v. Georgia, 408 U.S. 238 (1972).

The twelve states, including Ohio, which re-enacted capital punishment laws after Furman v. Georgia, supra, based on the aggravating/mitigating factors scheme of Model Penal Code Section 201.6 (Proposed Offical Draft, 1962) obviously did so to avoid the problems presented by allowance of unbridled discretion in the sentencing authority and condemned in Furman. Notwithstanding the substantive merits of the statutes, however, the discretion vested in, and exercised by, the office of the prosecutor remains unchecked. As but one example of the actual exercise of such discretion, see Appendix F setting forth facts which show discretion in one of its most dangerous forms: after an appellate reversal of his capital murder conviction, a brother was offered a dismissal of a death sentence of his sister, already affirmed by the Ohio Supreme Court, in return for his guilty plea to non capital murder.

The points at which prosecutorial discretion can be manifested in the capital offense criminal process are limitless: the example cited here represents only one such possibility. The injection of such discretion into the process of deciding who may live and who must die is more than the Eighth and Fourteenth Amendment can tolerate.

D. Denying Jury Determination of the Factual Issue of Existence of Mitigating Circumstances Abridges a Defendant's Sixth Amendment Right to Trial by Jury.

> In our criminal courts the jury sits as the representative of the community; its voice is that of the society against which the crime was committed. Williams v. New York, 337 U.S. 241 (1949) at 253 (Murphy, J., dissenting).

Ohio Revised Code Section 2929.03(C) precludes jury participation in the sentencing process: the function of the jury terminates with a determination of guilt or innocence of the offense and the aggravating specifications. Thus the voice of the aggrieved society is omitted in sentencing contrary to historic precedent as set forth in McGautha v. California, 402 U.S. 183 (1971) at 200.

Furthermore, the existence or absence of mitigating factors is, beyond any argument, a question of fact, on which a defendant has a Sixth Amendment right to jury determination. U.S. v. Kramer, 289 F. 2d 909 (C.A. 1961); U.S. v. DeVall, 462 F. 2d 137 (C.A. 5 1972). The jury is called upon to determine the factual issues relating to the existence of aggravation; fundamental fairness would seem to require that that same body make the factual determinations relating to mitigation as well.

E. The Ohio Scheme's Allowance for the Returning of Internally Inconsistent Verdicts as to Factual Questions Bearing on (1) Guilt and (2) Punishment Render the Entire Statute, and Petitioner's Death Sentence, Invalid.

The fact that the Ohio statute, as construed, (see the Ohio Supreme Court opinion in the instant case) would allow to stand a verdict of guilt based on a felony murder charge, and a verdict of innocence based on a felony murder aggravating specification under Ohio Revised Code Section 2929.04(A)(7) demonstrates the inequity of a situation in which a man is sentenced to forfeit his life based on conduct of which he has been found "not guilty". Such inequities must violate due process; and as this situation relates specifically to petitioner, see Part I, supra.

F. The Ohio Statutes Unconstitutionally Shift to Defendants the Burden to Prove the Existence of Mitigating Factors by a Preponderance of Evidence.

This Court held in Mullaney v. Wilbur, 421 U.S. 684 (1975), that, to satisfy due process requirements, the state must bear the burden of proving every element of a crime. Ohio Revised Code Section 2929.04 places the burden on a defendant to save his life by affirmatively proving mitigation. This

> fails to recognize that the criminal law... is

> concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Mullaney v. Wilbur, supra, at 698-699.

This degree of culpability is precisely what should be of primary importance in a mitigation inquiry. Ohio draws distinctions between aggravated murders where the defendant is acuittted; those where the defendant is convicted of the substantive offense and no mitigating factors are found; and those where the defendant is convicted of the substantive offense and mitigation is found to exist. The death penalty is imposed only in the latter situation; only in this situation, however, is the State relieved of its burden to prove its case beyond a reasonable doubt. Petitioner contends that this arrangement unconstitutionally shifts the burden of proof in violation of Mullaney v. Wilbur, supra, and In Re Winship, 397 U.S. 358 (1970).

G. The Death Penalty in Ohio Is In Fact Imposed Without Adequate Safeguards Designed to Insure That Like Sentences Are Imposed in Like Cases.

Plenary review of death sentences by a State's highest Court -- the only Court with statewide jurisdiction -- is an important procedural safeguard against the arbitrary and capricious imposition of the death penalty, Gregg v. Georgia, supra at 892-893, for it helps to insure not only that the death penalty is appropriate when measured by the facts of a particular case, but that it is proportionate to sentences imposed in similar cases. Although death sentence cases are reviewable as a matter of right in Ohio's appellate courts, including the Ohio Supreme Court, it was generally believed in the pre-Furman era that no Ohio reviewing court had the authority to set aside a death sentence as excessive or inappropriate. See McGautha v. California, and Crampton v. Ohio, 402 U.S. 183, 195, n. 7 (1971). However, in State v. Bayless, supra, at 86, the Ohio Supreme Court stated that it would "independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges." That the Court has not kept its promise with fidelity to Eighth Amendment values is strongly suggested by a brief review of the Ohio cases.

In State v. Edwards, supra, at 47, the Court, citing a pre-Furman capital case, State v. Cliff, 19 Ohio St. 2d 31, 249 N.E. 2d 823 (1969), explicitly stated that:

> In criminal appeals this court will not retry issues of fact (relating to mitigation). In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered.

The "substantial evidence" test in Ohio, however, as State v. Cliff, supra, makes clear, is an inordinately narrow test, for the verdict or sentence will be sustained under it unless no reasonable mind could reach the same conclusion. Whatever the merits of the "substantial evidence" test as a device for appellate review in non capital cases, it surely does not suffice in capital cases to insure that the death penalty is appropriate when measured by the facts of a particular case, especially when the burden of proving mitigation is on the defendant. In stark contrast to Ohio's procedure is the Florida procedure sustained in Proffitt, supra, at 923, "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida". (Emphasis added.)

In none of the nineteen cases in which the Ohio Supreme Court has sustained the death sentence has it even attempted to compare the case with any other case in which the death sentence was imposed or with any case in which the death sentence was averted.

In several cases, as indicated earlier, the Ohio Supreme Court has purported to interpret various mitigating factors broadly for the benefit of the defendant. These expansive readings could hardly have been anticipated by the trial judges who imposed the death sentence, and it is likely that they used narrower standards in holding that mitigation had not been proved. Despite this, the Ohio Supreme Court has not remanded a single case for a new sentencing hearing to be conducted pursuant to the newly articulated standards. Rather, in every case, the Court has simply reviewed the record as made, without even inquiring whether the standards used by the sentencer were compatible with the standards thereafter announced.

The Ohio Supreme Court, in the case of Woods, supra, while complaining that it had not received the presentence report, proceeded to review the

record without it, and affirmed the death sentence. Likewise in the instant case, the Court made no mention of the propriety of the penalty imposed upon petitioner either comparitively or as specially applied in the mitigation hearing.

In Proffitt v. Florida, supra, at 923, this Court observed that the Florida Supreme Court had set aside the death sentence in eight of twenty-one cases, thus evidencing scrupulous appellate review. The Ohio Supreme Court has reviewed twenty death sentence cases. It has set aside the conviction and sentence in one for evidentiary error unrelated to the penalty. In each of the nineteen remaining cases, however, it has affirmed the death sentence.

Whether Ohio's system of appellate review is adequate to comply with Eighth Amendment standards is a substantial constitutional question which should be resolved by this Count.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

James Kura
Franklin County Public Defender

By James Kura
JAMES KURA
Franklin County Public Defender
Member of the Bar of the Supreme
Court of the United States
400 South Front Street
Columbus, Ohio 43215
Phone: (614) 224-8374

and

By C. William Lutz
C. WILLIAM LUTZ
Assistant Franklin County Public Defender
400 South Front Street
Columbus, Ohio 43215
Phone: (614) 224-8374

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was personally delivered to the Office of the Prosecutor, Franklin County Hall of Justice, Columbus, Ohio 43215, this 26th day of May, 1977, in compliance with Rule 33(1) of the Rules of the United States Court.

JAMES KURA
Franklin County Public Defender
Member of the Bar of the Supreme
Court of the United States
400 South Front Street
Columbus, Ohio 43215
Phone: (614) 224-8374

and

C. WILLIAM LUTZ
Assistant Franklin County Public Defender
400 South Front Street
Columbus, Ohio 43215
Phone: (614) 224-8374

Supreme Court of the United States

No. A-809

TAYLOR HANCOCK, JR.,

Petitioner,

v.

OHIO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 31, 1977.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 4th day of April, 1977.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19..77.. TERM

To wit: January 14, 1977

State of Ohio,
Appellee,

vs.

Taylor Hancock,
Appellant.

No. 75-1070

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this.....day of..... 19.....

.....*Clerk.*

By .....*Deputy.*

5 Rec'd
FEB 14 1977

APPENDIX C

IN THE SUPREME COURT OF OHIO

1976

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

Case No. 75-1070

TAYLOR HANCOCK,

Defendant-Appellant.

DEFENDANT-APPELLANT'S MOTION FOR REHEARING

JAMES KURA
FRANKLIN COUNTY PUBLIC DEFENDER
400 South Front Street
Columbus, Ohio 43215
Phone: 224-8374

and

C. WILLIAM LUTZ
Counsel for Defendant-Appellant

and

RICHARD GONZALEZ
Legal Clerk

GEORGE C. SMITH
FRANKLIN COUNTY PROSECUTOR
Franklin County Hall of Justice
369 South High Street
Columbus, Ohio 43215

and

ALAN TRAVIS
Counsel for Plaintiff-Appellee

TABLE OF CONTENTS

MOTION FOR REHEARING

Now comes Defendant-Appellant, Taylor Hancock, through his attorney, C. William Lutz, and moves this Court for rehearing, pursuant to Rule IX of the Rules of Practice of the Supreme Court of Ohio.

PROPOSITION OF LAW NUMBER ONE

In A Prosecution For Aggravated Murder With Specifications, Questions To The Potential Jurors Regarding Their Attitudes Toward The Death Penalty Are Within The Permissible Scope Of Voir Dire. A Trial Court May Not Deny Counsel For Either Party The Opportunity To Examine Into A Prospective Juror's Ability To Sit As A Fair And Impartial Juror. (State v. Bayless (1976), 48 Ohio St. 2d 37 Approved and Followed).

Counsel for Defendant-Appellant originally submitted the above argument as a Motion To Have The Court Consider An Additional Proposition Of Law, and was filed as such on December 7, 1976. Inasmuch as the Court announced its decision on December 8, 1976, it is unlikely that the Court was aware of this Proposition of Law when the decision was handed down, and therefore, the Defendant-Appellant brings this issue before the Court by way of this Motion.

In the Bayless case, the Appellant argued that the Trial Court improperly allowed counsel to question the jury, on voir dire, regarding their attitudes toward the death penalty. In holding that this was not error the Court stated in the second syllabus:

> 2. In a prosecution for aggravated murder with specifications, a potential juror may be disqualified on voir dire if the trial court is satisfied from the inquiry that the juror will not render an impartial finding according to law as to the defendant's guilt or innocence, both of the charge and of the specifications. (Witherspoon v. Illinois, 391 U.S. 510, distinguished.)

In the instant case, the Trial court limited the voir dire of the jury and would not allow defense counsel to question the jury regarding their attitudes toward the death penalty. The defense objected stating that they felt they had "the right to question jurors as to their feelings on the death pen-

alty." (Reel 3, 10:44; Transcript pp. 11-13). Defendant-Appellant contends that, in light of this Court's discussion of this issue in Bayless, the above ruling by the Trial Court denied the Defendant-Appellant his constitutionally guaranteed right to trial by an impartial jury.

In Bayless, a total of eight jurors were excused because of their death penalty attitudes - six because their reservations regarding capital punishment would not allow them to be fair to the State, and two because their favoritism towards capital punishment would not allow them to be fair to the Defendant. Regarding this, this Court stated that:

> Indeed, the record on voir dire in this case provides a convincing demonstration of the need for such inquiries in capital cases. Bayless, supra, at p. 88.

The Court went on to say that:

> Despite the fact that capital case jurors are to consider only guilt, and that sentencing is left to the trial judge, we see in the record of this voir dire that a prospective juror's opinion on capital punishment often does prevent him from impartially applying the law, as it is given in the court's instructions, to the facts as he finds them.

In the instant case the Trial Court attempted to keep the jury in ignorance of the possible consequences of the case. To this point this Court stated that:

> We cannot agree that it is preferable or even possible that the jury be prevented from knowing that their verdict might result in the defendant's execution. Bayless, supra, at p. 90.

And that:

> Impanelling jurors in reliance on any such unrealistic assumption is so likely to result in juries with members who cannot render an impartial finding that it approaches, if it does not reach, absolute certainty. Ibid.

In the same paragraph the Court stated that if it held that prospective jurors could not be questioned regarding their attitudes toward the death penalty, then:

> It would seem to make necessary as well, the banning of any reference to the death penalty by counsel, even by defense counsel who would wish to impress jurors with the seriousness of their task. Ibid.

In the instant case, counsel for the Defendant-Appellant stated, to the Trial Court that he felt he had the right to so question the prospective jurors so that he might make them "aware of the seriousness of the case and the possible consequences thereof." (Reel 3, 10:46; Transcript p. 12).

Therefore, Defendant-Appellant asserts that he was improperly and unconstitutionally denied his right to full and fair voir dire of prospective jurors and that this denial was to his prejudicie and as such constitutes reversible error.

PROPOSITION OF LAW NUMBER TWO

A Jury Verdict Of Guilty To A Charge Of Purposely Causing Death While Committing Robbery, Which Also Finds The Defendant Not Guilty Of The Specification Of Purposely Causing Death While Committing Aggravated Robbery Is An Inconsistent Verdict Which Must Be Reversed.

On March 11, 1975, Defendant-Appellant, Taylor Hancock, was sentenced to death after having been found guilty of two counts of Aggravated Murder, with specifications. Simultaneously with the verdict of guilty to a count of murder, while committing a robbery, the jury returned a verdict of not guilty on specification three of that count. which stated that the murder had been committed while the offender was "committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery."

The fact that the Defendant-Appellant was found guilty of the charge of purposely causing the death of another while committing a robbery, and yet found not guilty of the substantially similar specification of committing a murder while committing an aggravated robbery, indicates that the verdict was inconsistent, and as such, should be reversed. The case falls within the principle of law that a verdict which is inconsistent as to the same count should be reversed. 15 A O. Jur. 2d Section 529.

This principle of law has been consistently followed. Griffin v. State, 18 Ohio St. 438 (1868), Browning v. State, 120 Ohio St. 62, 165 N.E. 566 (1929).

In State v.McNicol 143 Ohio St. 39 (1944), the Court explained the relevant test for consistency of a verdict:

> Jury verdicts in criminal cases are to have reasonable constructions and are not to be declared void unless from necessity, originating in doubt of their import or irresponsiveness to the issue submitted, or unless they show a manifest tendency to work injustice. (Woodford v. State, 1 Ohio St. 427, 430, and Norman v. State, 109 Ohio St. 213, approved and followed).

An application of this language to the instant case raises serious questions concerning the reasonableness of the Defendant-Appellant's verdict. There can be no reasonable construction of a jury verdict which finds guilt on a charge of murder while committing a robbery, but fails to find guilt on a virtually identical specification, of murder while committing an aggravated robbery. There is indeed doubt concerning the jury's responsiveness to the issues submitted, within the meaning of McNicol. The inconsistent jury verdict indeed suggests confusion in the minds of the jurors, and in a case of such vast importance, there can be no tolerance of obvious confusion and inconsistency.

The inconsistency of the verdict in the instant case is easily distinguishable from the equally well-established principle that inconsistency may exist between different counts of an indictment. As the Court stated in Browning v. State, 120 Ohio St. 62 (1929):

> The several counts of an indictment containing more than one count are not interdependent. A verdict responding to a designated count will be construed in light of the count designated, and no other. An inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only out of inconsistent responses to the same count. (Griffin v. State, 18 Ohio St. 438, approved and followed).

The instant case clearly falls within the later category. The failure to find guilt on a specification substantially the same as the charge is an inconsistency within the same count. As the Court in Browning concluded, an inconsistency of this nature must result in a reversal.

The relationship between a criminal charge of aggravated murder and its specifications is highly analogous to a situation where two defendants are tried jointly, with only one issue to be decided by the jury, as in State v. Hirsch, 101 Ohio App. 425 (1956). In reversing a lower Court conviction, the Cuyahoga County Court of Appeals announced:

> In a criminal action against two or more defendants who are tried together, and where there is but one issue to be decided by the jury, and where one defendant is charged as an aider and abettor, a verdict of guilty as to such defendant and not guilty as to a co-defendant is inconsistent and must be set aside.

The verdict in the instant case is similarly irreconciliable with the dictates of logic. The inherent contradiction within Defendant-Appellant's verdict renders it void.

Finally, the test set out in McNicol mandates that a jury verdict be reversed where there exists "a manifest tendency to work injustice." McNicol, supra 39. Due to the nature of a death penalty case, like the instant one, there clearly exists great potential for injustice based on an unclear and contradictory verdict. The Defendant-Appellant, therefore, respectfully requests this Court to reverse his conviction under count two of the indictment.

CONCLUSION

For the foregoing reasons, Defendant-Appellant respectfully urges this Court to reverse his conviction and remand his case for a new trial.

Respectfully submitted,

James Kura
Franklin County Hall of Justice

By C. William Lutz
C. WILLIAM LUTZ, LUT02
Counsel for Defendant-Appellant
400 South Front Street
Columbus, Ohio 43215
Phone: 224-8374

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the Office of the Prosecutor, Franklin County Hall of Justice, Columbus, Ohio, 43215, this 17th day of December, 1976.

C. William Lutz
C. WILLIAM LUTZ, LUT02
Counsel for Defendant-Appellant

Statement of the Case.

THE STATE OF OHIO, APPELLEE, v. HANCOCK, APPELLANT.

[Cite as State v. Hancock (1976), 48 Ohio St. 2d 147.]

Criminal law—Aggravated murder—Imposition of death penalty—Specifications in indictment—R. C. 2929.04(A)—Properly submitted to jury, when—Evidence—Photographic identification—Not impermissibly suggestive, when—Crim. R. 29(A), construed.

1. In an indictment for aggravated murder, a grand jury may state one or more specifications under one count when issuing the indictment.
2. The submission to a jury of one or more specifications of aggravation under one count in an indictment for aggravated murder, where each such specification presents a different premise of aggravating circumstances, does not necessarily constitute reversible error.

(No. 75-1070—Decided December 8, 1976.)

APPEAL from the Court of Appeals for Franklin County.

On June 7, 1974, the Rollerland Skating Rink in Columbus was the site of a record hop. To control the crowds, Rollerland employed three security guards, including Herman T. Anderson and Henry Wheatley. Sometime after 10:00 p. m., appellant, Taylor Hancock, Jr., became involved in an argument with Anderson, who ordered appellant to leave the Rollerland parking lot area. Later that evening, at approximately 11:20 p. m., an assailant shot and killed Anderson, thereafter fleeing the scene. Appellant was identified as the assailant by two eyewitnesses: Security guard Wheatley and Karen Lawson, a patron of Rollerland.

On the same night, at or about midnight, taxidriver David Martin was found inside his taxicab, fatally shot. He had last been heard from, by telephone, between 11:20 and 11:30 p. m. Laboratory examinations of the bullets used in both the Anderson and the Martin shootings, prepared by the Columbus Police Department and by the

State Bureau of Criminal Identification, established that the bullets were fired from the same weapon. There were no witnesses to the Martin homicide.

On June 17, 1974, officers of the Columbus Police Department showed photographs to eyewitnesses Wheatley and Lawson, at their respective residences, and each witness identified appellant as Anderson's assailant. On August 7, 1974, appellant was indicted on two counts of aggravated murder in violation of R. C. 2903.01, and on Septempber 5, 1974, the indictment was amended to include one specification under the first count and three specifications under the second count.

Appellant was tried to a jury and was found guilty under the first count of the indictment with the specification of aggravation, and under the second count of the indictment with two specifications of aggravation; a verdict of not guilty was returned for the third specification under the second count. On March 11, 1975, appellant was sentenced to death.

The Court of Appeals affirmed the judgment of conviction, and the cause is now before this court pursuant to an appeal as a matter of right.

Mr. George C. Smith, prosecuting attorney, and *Mr. David J. Graeff*, for appellee.

Ms. Carolyn A. Watts, Mr. James Kura and *Mr. C. William Lutz*, for appellant.

Herbert, J. Appellant contends initially that the submission to a jury, over the objection of the defendant, of three specifications of aggravation under one count of aggravated murder, pursuant to R. C. 2929.04(A), where each specification presents a different premise of aggravating circumstances, constitutes reversible error.

Imposition of the death penalty for aggravated murder in this state is precluded unless "one or more" of statutorily specified criteria is identified in the indictment or count in the indictment, pursuant to R. C. 2941.14, and is proved beyond a reasonable doubt. R. C. 2929.03(B) and 2929.04(A). The amended indictment returned against appellant included four specifications of aggravation under

R. C. 2929.04(A). The state presented the following three of these specifications under the second count of the indictment:

First, said offense was committed for the purpose of escaping detection, apprehension, trial or punishment for another offense committed by the offender;

Second, said offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender;

Third, said offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery. These specifications are those provided for by R. C. 2929.04(A)(3), (5), and (7) respectively.

Appellant recognizes that R. C. 2929.03(B) and 2929.04(A) both include the language "one or more" in reference to the specifications of aggravating circumstances which must be included in a capital indictment, but argues that an indictment for murder should contain more than one of these specifications only when the indictment and specifications taken as a whole alleges one consistent theory as to the character of the crime and the frame of mind of the accused in order to justify the death penalty. According to appellant, the three above-referenced specifications failed to allege such a single, consistent theory.

We are not pursuaded that three specifications of aggravation must be mutually exclusive. A consistent theory of an offense can encompass mixed motives; for example, the trier of facts could logically find, in a proper case, that an accused simultaneously intended both a second killing and the elimination of a witness to an escape from the scene of a first killing.

In an indictment for aggravated murder, a grand jury may state one or more specifications under one count when issuing the indictment, and the submission to a jury of one or more specifications of aggravation under one count in an indictment for murder, where each such specification presents a different premise of aggravating circumstances, does not necessarily constitute reversible error.

Appellant urges further that he was denied due process of law through a pretrial photographic identification procedure which was unnecessarily suggestive and which was conducive to irreparable mistaken identification at the trial. He notes that when witness Wheatley spoke with the police on the night in question, he described the killer of Anderson as a man whose hair was done in "knots." Under cross-examination at trial, Wheatley indicated that of the photographs shown him thereafter by police, appellant's was the only one of a person with "knots" in his hair.

The United States Supreme Court speaks of photographic identification in *Simmons* v. *United States* (1968), 390 U. S. 377, 384:

"Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." See, *State* v. *Breedlove* (1971), 26 Ohio St. 2d 178, 271 N. E. 2d 238. See, also, *State* v. *Jackson* (1971), 26 Ohio St. 2d 74, 269 N. E. 2d 118; and *State* v. *Wilkinson* (1971), 26 Ohio St. 2d 185, 271 N. E. 2d 242.

In this case, appellant was identified at trial by two witnesses: Wheatley and Lawson. Examination of the

trial transcript discloses that both of these in-court identifications withstood vigorous cross-examination by counsel for appellant.

Witness Wheatley testified that the lighting was bright at the time of the Anderson shooting. He himself was only "about one good step" from precisely where the crime occurred; his face was burned by the blast and he felt the smoke from the gun.

Witness Lawson obtained only a brief view of the assailant at the time of the shooting. However, she testified as to the assailant's walking in front of the skating rink, as to his pointing a gun and as to his shooting the decedent; she added that there were lights burning in that area.

We conclude from the record at bar that the pretrial photographic identification procedure employed in this case was not so impermissibly suggestive as to give rise to a "very substantial likelihood of irreparable misidentification" at the trial. *Simmons* v. *United States, supra.*

Appellant argues also that the evidence against him was insufficient to warrant submission of the case to the jury and insufficient to support a guilty verdict. He states that the evidence was not irreconcilable with any reasonable theory of his innocence.

Crim. R. 29(A) provides that the trial court, upon motion of a defendant or its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. Appellant contends that Crim. R. 29(A) is essentially identical to Federal Rule of Criminal Procedure 29, and that the most appropriate of various interpretations of the latter has been stated by the Sixth Circuit Court of Appeals in *United States* v. *Collon* (1970), 426 F. 2d 939. That court observed, at page 942:

"In determining the sufficiency of the evidence to withstand a motion for a judgment of acquittal, the evidence and all reasonable inferences that may be drawn

therefrom must be viewed in the light most favorable to the government. * * * And if under such view of the evidence it is concluded that a reasonable mind might fairly find guilt beyond a reasonable doubt, the issue is for the jury. However, if under such view of the evidence it is concluded there must be some doubt in a reasonable mind, the motion for acquittal must be sustained. * * *"

Assuming, *arguendo*, that Crim. R. 29 parallels Federal Rule of Criminal Procedure 29, and that *Collon* correctly interprets that rule, it cannot be concluded from the evidence in the instant case that there *must* be some doubt in a reasonable mind as to the guilt of appellant.

The evidence before the trial court included, as to the murder of Herman Anderson, the in-court identification of appellant by two eyewitnesses, two pretrial photographic identifications of appellant by eyewitnesses, evidence of an "argument" between Anderson and appellant, the expulsion from the skating rink of appellant by Anderson, the return of appellant to the rink and his statement to Anderson, "I told you I'll be back," made at the time of the shooting. The evidence before the trial court as to the Martin homicide showed that the victim was shot within the same general vicinity and timespan as Anderson, and that both Anderson and Martin were killed with the same weapon.

As we view the record herein, the verdict of the jury is supported by sufficient probative evidence, and the cause was properly submitted to the jury for its deliberation.

Appellant's final argument is that the imposition of capital punishment constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In view of this court's decision in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, this proposition is not well taken.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

The State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 75AP-151
Taylor Hancock, Jr.,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 23, 1975

MR. GEORGE C. SMITH, Prosecuting Attorney,
MR. ALAN TRAVIS and
MR. DAVE GRAEFF, Assistants,
Franklin County Hall of Justice,
369 South High Street,
Columbus, Ohio,
For Plaintiff-Appellee.

LEGAL AID AND DEFENDER SOCIETY,
MS. CAROLYN A. WATTS, Director,
MR. JAMES KURA, Assistant,
241 South High Street,
Columbus, Ohio,
For Defendant-Appellant.

REILLY, J.

This is an appeal from a judgment and sentence of the Court of Common Pleas, Franklin County, Ohio.

The case involves two murders. Herman T. Anderson, a security guard at Rollerland skating rink, 818 East Mound Street, was one. David

Martin, a taxicab driver, found dead in Denton Alley nearby, was the other. Appellant was indicted August 7, 1974, upon two counts of aggravated murder, (R. C. 2903.01), to wit:

> "First Count
>
> "The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, in the name and by the authority of the State of Ohio, upon their oath do find and present that Taylor Hancock, Jr. late of said County, on or about the 7th day of June in the year of our Lord, one thousand nine hundred and seventy four within the County of Franklin aforesaid, in violation of Section 2903.01 R. C. did, purposely and with prior calculation and design, cause the death of Herman T. Anderson,
>
> "Second Count
>
> "And the Grand Jurors aforesaid, upon their oath, do further find and present that Taylor Hancock, Jr. on or about the 7th day of June, 1974, within the County of Franklin aforesaid, in violation of Section 2903.01 R. C., did, purposely, cause the death of David Martin, while committing Robbery."

Subsequently, the indictment was amended, as follows:

> "AMENDMENT TO INDICTMENT
>
> "The Jurors of the Grand Jury of the State of Ohio, duly selected, impaneled, sworn, and charged to inquire of crimes and offenses committed within the body of Franklin County, in the State of Ohio, in the name and by the authority of the State of Ohio, upon additional presentation of fact and law by the Office of the Prosecuting Attorney, upon their oath do find and present Specifications to the Indictment previously filed in this cause, as follows:
>
> "SPECIFICATION 1 to the First Count under Section 2929.04(A)(5), Revised Code, in compliance with

> Section 2941.14, Revised Code: The Grand Jurors further find and specify that said offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender;
>
> "SPECIFICATION 1 to the Second Count under Section 2929.04(A)(3), Revised Code, in compliance with Section 2941.14, Revised Code: The Grand Jurors further find and specify that said offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender;
>
> "SPECIFICATION 2 to the Second Count under Section 2929.04(A)(5), Revised Code, in compliance with Section 2941.14, Revised Code: The Grand Jurors further find and specify that said offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender;
>
> "SPECIFICATION 3 to the Second Count under Section 2929.04(A)(7), Revised Code, in compliance with Section 2941.14, Revised Code: The Grand Jurors further find and specify that said offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit aggravated robbery."

Two eyewitnesses testified upon their voir dire examination and at trial. They were Henry Wheatley and Karen Lawson. They both identified appellant in open court, and from photographs, as the person who killed Herman Anderson. After hearing their testimony at the pretrial examination, the trial court overruled appellant's motion to suppress identification.

The record shows that, the evening of June 7, 1974, Rollerland was having a "record hop skating party." The attendance inside was estimated by witnesses at about 600 to 700 persons. The crowd gathered

outside during the evening varied from about 50 to 250 people. Three security guards were employed to control the crowds. They included the decedent Herman Anderson, Henry Wheatley, and Greg Roddy.

The first witness for the state was Henry Wheatley. Mr. Wheatley was employed as a security guard to keep people from entering the skating rink without paying the admission fee. He was working close to Herman Anderson. His testimony was that they had worked together before upon numerous occasions. He said two men came up to the entrance and one said, "I told you I'd be back." He held what Mr. Wheatley described as a black object, appearing to be a cane. Then Mr. Wheatley heard a shot and saw Herman Anderson fall. He went after the assailant outside the rink, where he saw two men running through the parking lot in the general northerly direction toward Main Street. Mr. Wheatley described the assailant as having knots in his hair. Later, police officers went to Mr. Wheatley's home with photographs, from which he identified appellant. He also identified appellant and appellant's photograph in open court. Mr. Wheatley emphasized that, when the shooting occurred, he was close to the decedent; that he heard a "ping," which burned the side of his face. Mr. Wheatley testified that his age was "73, going on 74."

Karen Lawson, age 17, described the assailant as being shirtless. She testified that she identified his photograph when Columbus police officers showed her several photographs at her residence. Karen also identified appellant, as well as his photograph, in open court. She said that, while she was standing in the lot in front of the skating rink, her attention was directed to the entrance, and that

she saw a man without a shirt lift a rifle and shoot. She testified that he was alone when the shooting occurred. She said she had seen appellant in the parking lot about twenty minutes earlier, and that, after the shot was fired, he placed the rifle to his side and ran in the direction of Main Street and turned left, or west, around the side of the building.

Greg Roddy testified that Herman Anderson was involved in other altercations during the evening at Rollerland. Further, Karen Lawson testified that she had been going there for many years, and that the decedent was "nice to some, and if there were trouble with others, he took care of them." However, she had witnessed arguments, but no striking by decedent of any persons with his nightstick.

Appellant and Willie Dumas both stated at trial that they were together that evening, and were in the parking lot of Rollerland around 9:30 p.m. They said they were involved in some argument with the decedent, who ordered them to leave the parking lot area, and that Anderson used chemical mace upon appellant to enforce the departure. Consequently, resulting from the sting of the mace, appellant removed his shirt and left it in a corner of the parking lot area. They both said they returned to the Dumas home at 1047 Linwood Avenue; and contended they were there when the shootings occurred.

Despite the crowd in the vicinity at the time of the shooting, there were only three witnesses who testified as having witnessed the crime. Nevertheless, both Henry Wheatley and Karen Lawson identified appellant in open court as the assailant, and also picked out his photograph. Joseph Valentine testified in appellant's case that he witnessed

the shooting. He said that he was standing just outside the entrance when he saw a man with a gun behind his back. He described the assailant as fully dressed, with short hair, not braided, who was alone. Joseph Valentine testified he saw a man with a gun; that he ran, heard the shot, but could not identify the person who fired the gun.

There were no witnesses to the murder of David Martin. Dorothy Evans testified that she had talked with him over the telephone between 11:20 and 11:30 p.m., June 7th. The taxicab he was driving that evening was seen on Denton Alley, between Linwood and Wilson Avenues, with its lights on and engine running, between 11:20 and midnight. He was found dead inside the taxicab by Cornelius Code about midnight. Roger Royal testified that he saw the taxi enter Denton Alley with a passenger, who he described only as wearing what appeared to be a woman's hat.

Laboratory examinations of the bullets used in both shootings, prepared by the Columbus Police Department and by the Bureau of Criminal Identification and Investigation, were presented at trial. Both ballistics reports indicated that the bullets were fired from the same weapon. Dorothy Evans, a friend of David Martin, said that she had seen him last at approximately 2 o'clock, June 7th; that he took her to the university to pick up his paycheck; that he had some money in his pocket; and was wearing a watch, her ring on his "pinkie" finger, and his ring. Further, she said he carried charge cards. The jewelry, charge cards, and money were not located upon David Martin when he was found dead.

Appellant moved for acquittal under the second count of the indictment, and a motion to dismiss all of the specifications, under Crim. R. 29(A), at the close of the state's case. This motion was overruled

by the trial court. Appellant again moved for acquittal at the close of defendant's case. This motion was also overruled. The jury returned a verdict of guilty for Count 1 and a specification under Count 1 of the indictment, and for Count 2, with specifications 1 and 2. The verdict was not guilty for the third specification to Count 2. Defendant filed a motion for a judgment of acquittal with respect to Count 2, and for all specifications under Crim. R. 29(C), January 2, 1975. This motion was overruled by the trial court.

Appellant was sentenced to punishment by death, March 11, 1975. Whereupon, a timely notice of appeal was filed, including six assignments of error.

The first assignment of error is the following:

> 1. "The Trial Court erred in overruling defendant's motion to the court to order the prosecutor to elect no more than one specification for each count in the indictment."

The indictment was, of course, issued by the Grand Jury, which was governed by the controlling statutes. R. C. 2941.14 reads as follows:

> "(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.
>
> "(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is

> specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.
>
> "(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form: * * *"

The reason for the specification requirement is to designate the aggravating circumstances in an indictment when the death penalty is to be invoked. Moreover, even if the jury renders a guilty verdict concerning a specification, R. C. 2909.04 includes mitigating circumstances, precluding the death penalty. Notwithstanding, there were not actually unlimited specifications in this case. The jury found appellant guilty of two of three specifications in the indictment. R. C. 2941.14 and R. C. 2929.24 specifically allow for more than one count for aggravated murder. Therefore, appellant's first assignment of error is not well taken and is overruled.

Appellant's second assignment of error is as follows:

> 2. "The trial court erred in overruling defendant's motion to suppress identification."

As noted above, and is reiterated, both Henry Wheatley and Karen Lawson testified upon voir dire and at trial, and identified appellant as the person who shot Herman Anderson. In both instances, they categorically identified appellant in open court. It is appellant's contention that the overruling of appellant's motion to suppress was a denial of due process of law [citing *Simmons v. United States* (1968),

390 U. S. 377, 88 S. Ct. 967]. The record does not support this contention. We repeat, for emphasis, that Henry Wheatley testified that he was a gu at Rollerland, stationed close to the deceased, when the shootin happened. He said Anderson was seated at a table when two persons approached him. He heard one say, "I told you I'd be back." Then he heard a noise, and apparently the fire scorched his face. The person who spoke had a black object in his hand. He said the police came to his home June 17, 1974, with photographs. He testified they did not suggest anything concerning the individuals pictured. Nonetheless, he chose one as the man he saw at Rollerland, and signed, as well as dated, the photograph. He testified the lights where the murder occurred were bright. A view of the video does not indicate doubt by Mr. Wheatley either in identifying the photos or his open court identification. Moreover, we again note that Karen Lawson said the police also came to her house with photographs, and she positively selected appellant's picture, and so indicated on the back. The video also shows that she, too, was quite definite in her open court identifications.

Therefore, the circumstances at the scene of the Anderson murder were such that both identification witnesses had a view of appellant. Then they chose his picture from the photos shown them, without evidence of prompting by the police, and subsequently identified him in open court. Thus, considering the totality of the circumstances of this case, the trial court did not commit error by overruling the motion to suppress identification. Consequently, appellant's second assignment of error is overruled.

Appellant's third assignment of error is the following:

3. "The Trial Court erred in ruling that the prosecutor could cross-examine and impeach his own witness."

Willie Dumas, appellant's companion at the time of the crime, was called by the state as a witness. He testified that Herman Anderson and appellant were in an argument; and that Anderson "maced" appellant, who removed his shirt due to the mace sting. Whereupon, defense counsel sought a ruling concerning the extent of the cross-examination of Dumas. The trial court limited the cross-examination to the testimony upon direct; and added that the defense could call Dumas in its case, reserving the state's right to cross-examination at that time. The crux of the trial court's ruling was that when the defense called Willie Dumas the prosecution would have the right to cross-examine. Fundamentally, the examination of witnesses, and the extent of cross-examination, rests within the sound discretion of the trial court. (56 Ohio Jurisprudence 2d, Sec. 315, pages 745-748.) The transcript indicates the witness was appellant's friend and companion the night of the killings. The procedure was not unfair to either side and, thus, there was not an abuse of discretion by the trial court. Appellant's third assignment of error is overruled.

Appellant's fourth and fifth assignments of error are the following:

4. "The Trial Court erred in overruling defendant's motions for acquittal at the close of the state's case and at the conclusion of all evidence."

5. "The Trial Court erred in overruling defendant's motion for acquittal after the jury returned the verdicts."

Steve Molnar, Jr., of the Ohio State Bureau of Criminal Identification and Investigation at London, Ohio, testified that the bullets which killed Herman T. Anderson and David Martin came from the same gun. Specifically, that testimony was as follows (Tr-328):

"Q. Did you examine these bullets to determine whether or not in your opinion they came from the same gun barrel?

"A. Yes, I did.

"Q. Mr. Molnar, do you have an opinion as to whether or not State's Exhibit 26 and State's Exhibit 27, the bullets respectively, were fired from the same gun barrel?

"A. Yes, I do.

"Q. What is that opinion, sir?

"A. In my opinion, State's Exhibit 26 and State's Exhibit 27 were fired from the same rifled firearm.

"Q. Could they have been fired from any other?

"A. No, sir.

"Q. Thank you very much, Mr. Molnar."

Furthermore, there is mutual Exhibit B, by R. Fischer, the results of examination, to wit:

"The bullets (PR#117997 and PR#117998) were examined and determined to be .22 cap bullets. These bullets were both fired from a .22 caliber weapon having a barrel having six (6) lands and grooves with a right hand twist. It is my opinion that both of these bullets (PR#117997 and PR#117998) were fired from the same weapon."

The record also includes the laboratory report of the Bureau of Criminal Identification (State's Exhibit 30) findings:

"FINDINGS:

"Examination revealed that both specimens were of .22 caliber bullets, copper coated, and both impact damaged. They are engraved with rifling impressions of 4 land and grooves right twist, and a microscopic comparison of the two bullets revealed matching barrel engraved characteristics that confirmed that both bullets were fired from the same firearm.

"The configuration of the cannelures on the bullet are those of a .22 BB Cap (Bulleted Breech), which contain an 18 to 20 grain bullet. These two specimens weigh 14.5 and 18.5 grains respectively."

Further, there is testimony that the shells, or cartridges, were unusual. That is, of course, a side issue, as the crux of the matter is the evidence that the shells were fired from the same gun.

Dorothy Evans, David Martin's girl friend, as we have noted above, testified he talked with her on the phone between 11:20 and 11:30 p.m. She also testified that when they were together earlier that day he was wearing two rings, a watch, he had money to pay bills, credit cards, a check for more than a hundred dollars, and presumably some money from fares. However, when he was found, he had only about ten dollars ($10.04) and a ring on his person, along with miscellaneous items.

These assignments of error are based upon Rule 29 of the Rules of Criminal Procedure, which, because of the nature of the case, is quoted verbatim:

"(A) MOTION FOR JUDGMENT OF ACQUITTAL. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged

> in the indictment, information. or complaint, *if the evidence is insufficient to sustain a conviction of such offense or offenses.* The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case. (Emphasis added.)
>
> "(B) RESERVATION OF DECISION ON MOTION. If a motion for a judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict, or after it returns a verdict of guilty, or after it is discharged without having returned a verdict.
>
> "(C) MOTION AFTER VERDICT OR DISCHARGE OF JURY. If a jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within fourteen days after the jury is discharged or within such further time as the court may fix during the fourteen day period. If a verdict of guilty is returned, the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. It shall not be a prerequisite to the making of such motion that a similar motion has been made prior to the submission of the case to the jury."

The rule specifically refers to the sufficiency of the evidence before the court. In sum, this includes, as to Herman Anderson: two eyewitnesses' in court identifications; two photographic identifications; the altercation between appellant and the deceased prior to the shooting; admitted removal of appellant's shirt; testimony that the man who fired the shot was shirtless; and the statement, "I told you I'd be back." The evidence also showed David Martin was killed within the time span, and in the immediate area; he did not have rings, watch, credit cards, or money, except for about ten dollars. Further, there was the evidence

that both men were killed with the same gun. Considering this evidence, which is not necessarily inclusive, within the totality of the record, appellant's fourth and fifth assignments of error are overruled.

Appellant's sixth assignment of error is the following:

> 6. "The trial court erred in overruling defendant's motion to strike all specifications from the indictment since Section 2929.04 Revised Code violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section IX of the Constitution of Ohio."

This assignment of error essentially challenges the constitutionality of the death penalty. This court has, of course, twice considered the issue recently, in *State v. Harris*, No. 74AP-580, rendered June 10, 1975 (1975 Decisions, page 1316); and *State v. Royster*, No. 75AP-195, rendered August 26, 1975 (1975 Decisions, page 2075). Judge Strausbaugh, in the opinion of the *Harris* case, which was this court's initial decision upon the issue, succinctly wrote:

> "Accordingly, the new Ohio law provides for a mandatory death penalty in certain cases of murder dependent upon the factual determinations made. The death penalty, being mandatory, rather than discretionary, is not precluded by *Furman*.
>
> "As pointed out in the various opinions in *Furman*, the United States Supreme Court through the years has found the death penalty to be constitutional. *Furman* can be viewed as authority only for the proposition that a discretionary death penalty is unconstitutional. Accordingly, this court remains bound by the prior United States Supreme Court's decisions that the death penalty *per se* is constitutional and would be remiss in rendering a judgment predicated upon an

> assumption that all three of the justices who did not reach the issue would conclude that the death penalty is *per se* unconstitutional, including a mandatory death penalty such as is established by the present Ohio law.
>
> "Accordingly, regardless of our personal convictions as to whether the death penalty is morally right, we are bound to apply the law as enacted by the General Assembly, giving it the full benefit of the presumption of constitutionality, and not substitute for the legislative determination our own personal convictions. Unless, and until, either the Ohio Supreme Court or the United States Supreme Court finds that the death penalty is *per se* unconstitutional, this court, as an intermediate appellate court, is bound to uphold the constitutionality of the mandatory death penalty imposed by the present Ohio law."

Hence, the General Assembly has spoken, within its power and jurisdiction. The trial court heard the evidence, applied the law, and the jury rendered its verdicts. This intermediate appellate court is required to sustain the constitutionality of the law. Therefore, appellant's sixth assignment of error is overruled.

Whereupon, for the foregoing reasons, the judgment of the trial court is affirmed.

STRAUSBAUGH, P. J., and McCORMAC, J., concur.

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO,

CRIMINAL DIVISION

- - -

State of Ohio, :

Plaintiff, :

vs. : Case No. 76CR-12-3104

Dennis C. Burke, :

Defendant. :

- - -

EXCERPTS OF PROCEEDINGS

- - -

Taken before the Honorable Fred J. Shoemaker, Judge, Court of Common Pleas of Franklin County, Ohio, under date of February 15, 1977.

- - -

APPEARANCES:

Mr. Gerald Todaro, Assistant Prosecuting Attorney,
On behalf of the Plaintiff, State of Ohio.

Mr. Gary M. Schweickart and Mr. Thomas Vivyan,
On behalf of the Defendant, Dennis C. Burke.

- - -

Tuesday Afternoon Session,

February 15, 1977.

- - -

* * * * *

- - -

WILLIAM LAZAROW

Called as a witness on benalf of tne Defendant, naving been first duly sworn, testified as follows:

MR. SCHWEICKART: If I may, Your Honor, I tnink to nelp focus tnings, and I'm sure for tne Prosecutor, because ne doesn't know wny I called Mr. Lazarow, to give just a brief statement as to -- in tne way of an opening statement, witn respect to Mr. Lazarow's testimony on tnis motion, if I may.

THE COURT: Wny don't you just ask nim. I tnink we'll figure it out.

MR. SCHWEICKART: Okay, very good.

- - -

DIRECT EXAMINATION

By Mr. Schweickart:

Q. State your name, please?

A. William Lazarow.

Q. And what is your occupation, sir?

A. I am an attorney. My office is located at 16 East Broad Street, Columbus, Onio.

Q. Mr. Lazarow, very recently have you had an opportunity to be representing anyone charged with a capital offense?

A. Yes, I was appointed, recently, to represent Mr. James Lockett in Summit County, the case of State of Ohio versus James Lockett.

Q. Now, with respect to your representation of Mr. Lockett -- this is a capital case in the State of Ohio?

A. That is correct.

Q. Okay. Now, were there any Codefendants on that case?

A. Maybe I should give just a little background.

Q. Please do.

A. Mr. James Lockett was one of four individuals charged in a felony murder case which arose in January of 1975 in Akron, Ohio.

THE COURT: Isn't that the case that just came out in the O. Bar?

THE WITNESS: That's correct.

THE COURT: And I think the day after it came out I was talking to you or the day -- I remember you were --

MR. SCHWEICKART: You were talking to me, I believe.

THE COURT: Was it you?

THE WITNESS: I don't think I had any conversation with you.

THE COURT: I know about the case; it's a reported case.

THE WITNESS: There were two cases reported the same day. James' case was reversed. He had been convicted and given -- sentenced to the death penalty. His sister, Sandra's case was affirmed on the same day. She also had been sentenced to death.

Q. (By Mr. Schweickart) Okay. Now, has the case of James Lockett been remanded for new trial?

A. Yes, it has.

Q. Now, recently, and using recently, let's take you back to the events of yesterday, being February 14, 1977, did you have the occasion to engage in any plea bargaining with representatives of the Prosecution for the State of Ohio on this case?

A. Yes, I did. We did have a hearing yesterday morning in Akron. At that time I met Mr. Kirkwood of the Prosecutor's Office in Summit County who informed me that he was the chief trial counsel there. We did have some discussions on possibly resolving the case short of trial; and he did come up with a proposal.

Q. Can you tell the Court what the proposal was?

MR. TODARO: Judge --

THE COURT: I don't see how it's relevant.

MR. SCHWEICKART: Your Honor, that's what I say, if

I had an opportunity to --

THE COURT: Take, proffer the answer. I don't see how it's relevant, but answer it for the record.

MR. TODARO: Note my objection.

THE WITNESS: It was suggested that we plead Mr. James Lockett, whose case was remanded, guilty to aggravated murder; that the death specifications would be dropped; and that the Prosecutor's Office would have a request in Sandra's case, it be brought back to the Court through a post-conviction action, have her conviction not reversed, but vacate her conviction and have her also plead guilty to aggravated murder without the specifications, thereby taking her off of death row where she now is.

So, in effect, they offered to have Mr. Lockett plead guilty to murder without specifications; then his sister, whose case had been affirmed by the Ohio Supreme Court, would thus be taken off of death row and have the death penalty removed from her head.

Q. (By Mr. Schweickart) In other words, to use the prosecutorial discretion representing the State of Ohio, the Summit County people, in essence, offered to not to kill James Lockett's sister if he would plead guilty to aggravated murder, is that correct?

A. That was my understanding.

Q. And to your knowledge, was any of this negotiation

subject to judicial approval?

A. Mr. Kirkwood indicated that, when I asked him, inquired into the method by which this would be done, the method by which Sandra's plea would be vacated or Sandra's conviction, he indicated that he had had no trouble with this in the past, that there were different methods by which this could be done.

We did have a brief conversation with the Judge on the case, Judge Barbuto, and he indicated in this case that anything we agreed along this line he would go along with 99 percent of the time.

Q. In other words then, or if I'm correct, Mr. Lazarow, that the State was discussing sparing an individual who had been convicted in the State Court process, had been not found to be any mitigation in the State Court process, was sentenced to death in the State Court process, and had the sentence of death affirmed by the highest court in the State of Ohio, through the vehicle of prosecutorial discretion was offering life to that individual through a plea bargain with a Codefendant; is that fair?

A. Yes, that's basically correct.

MR. SCHWEICKART: Thank you.

- - -